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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 196

MERLIN M. ARMSTRONG, ET AL., *Petitioners*

v.

THE UNITED STATES, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Claims in this case.

OPINIONS BELOW

The opinion of the Court of Claims (Appendix A, *infra*, pp. 1a-28a) is not officially reported. The reported opinions of the Court of Claims in companion cases are as follows: *Farley* v. *United States*, 134

C.Cls. 776 (1955); *England* v. *United States*, 133 C.Cls. 768 (1956); *Gaethe* v. *United States*, 136 C.Cls. 756, 145 F.Supp. 913 (1956), and *Sawyer* v. *United States*, 139 C.Cls. 837 (1957). The unreported companion opinions of the Court of Claims are as follows, and slip opinions have been lodged with the Clerk of this Court: *Ahearn* v. *United States*, No. 332-55, C.Cls., May 7, 1958; *Autry* v. *United States*, No. 266-56, C.Cls., March 5, 1958, and *Collins* v. *United States*, No. 141-56, C.Cls., March 5, 1958.

JURISDICTION

The judgment of the Court of Claims was entered on January 14, 1959. A timely petition for rehearing was denied by that Court on April 8, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. Sections 1255(1) and 2101 (*e*). The Court of first instance obtained jurisdiction under 28 U.S.C. Section 1491.

STATUTE INVOLVED

Federal Employees Pay Act of 1945, effective July 1, 1945, 59 Stat. 295, as amended, 5 U.S.C. 911, 921 provides:

> "TITLE II—COMPENSATION FOR OVERTIME
>
> "Overtime Pay
>
> "SEC. 201. Officers and employees to whom this title applies shall, in addition to their basic compensation, be compensated for all hours of employment, officially ordered or approved, in excess of forty hours in any administrative work week, at overtime rates, as follows . . ."

"TITLE III—COMPENSATION FOR NIGHT AND HOLIDAY WORK?

"Night Pay Differential

"SEC. 301. Any officer or employee to whom this title applies who is assigned to a regularly scheduled tour of duty, any part of which, including overtime, falls between the hours of 6 o'clock postmeridian and 6 o'clock antemeridian, shall, for duty between such hours, excluding periods when he is in leave status, be paid compensation at a rate 10 percentum in excess of his rate of basic compensation for duty between other hours: *Provided,* That such differential for night duty shall not be included in computing any overtime compensation to which the officer or employee may be entitled: *And provided further,* That this section shall not operate to modify the provisions of the Act of July 1, 1944 (Public Law 394, 78th Congress), or any other law authorizing additional compensation for night work."

QUESTIONS PRESENTED

1. Can the Federal Government keep its employees on the job overnight—8 hours—without pay or any consideration whatever?

2. If the answer to question number one is "yes", are plaintiffs nevertheless entitled to recover for hours of actual work performed and the interruptions during their so-called eating hours and night hours?

3. Are plaintiffs entitled to full night differential pay for all hours of duty between 6 p.m. and 6 a.m.?

STATEMENT OF THE CASE.

Plaintiffs are employees of the United States Government stationed at Tinker Air Force Base, headquarters of the Western Defense System of the United

States and the largest air depot in the United States Air Force carrying on the major overhaul and modification work of the Air Force.

The base operated 24 hours daily for aircraft take off and landing, and its mission of servicing, repairing and modifying aircraft was carried out by three 8-hour shifts of personnel engaged 24 hours a day at all times during the period of claim, so that the base was in continuous activity day and night.

Plaintiffs were assigned to the Fire Protection and Aircraft Crash Rescue Branch as firefighters. They were officially ordered to be on the job 60 hours a week and 72 hours a week, as the case might be, for the entire period of their claim. They were on duty 24 hours and off duty 24 hours.

In the 60-hour week, they were not paid for 20 hours of time on the job and in the 72-hour week, they were not paid for 24 hours. They received no time off or other privileges for this extra work.

Neither were plaintiffs paid the 10% night differential for the 8 night hours of duty in accordance with Sec. 301 of the statute.

Plaintiffs were officially ordered to be on duty in the confines of the fire station at all times. They could not eat at the base cafeteria, but had to prepare their own food. They could not have visitors.

The findings of the Court below show:

1. "When plaintiffs were employed, it was understood that there would be no distinction between the hours of the day and night and no specific time was set aside for the carrying on of any personal activities such as sleeping or eating. Plaintiffs responded to any

and all calls occurring at night in the same manner as during the daytime" (F. 16).[1] There was no Air Force or Base regulation providing for sleeping and eating time.

2. Plaintiffs were skilled and trained in aircraft crash rescue and firefighting of the kind required at an active air base, combining constant flying operations and heavy aircraft industrial activity. (F. 6)

3. Much of the plaintiffs' work is of an extremely hazardous nature. (F. 12)

4. "The firefighting equipment utilized at the base is especially designed for Air Force use. It is complicated and represents an investment of over one-quarter million dollars. It is not the type of equipment often associated with municipal or institutional structural firefighting. The firefighters are the only persons on the base who have operating responsibility for this equipment. Extensive periods of training are required for proficiency in operation." (F. 9).

5. Plaintiffs were responsible for a wide range of work and "no other personnel was responsible, trained or authorized to carry out these functions . . . In the event of the absence or inability of the firefighters . . . the necessary protection and service would not be available." (F. 10)

6. The base operated 24 hours daily for flying and industrial operations. "Thus it was necessary for all plaintiffs to be available for duty all hours of the night or the function of the base would not be adequately performed. Plaintiffs were subject to call throughout the night hours for the same type of work as through the day hours." (F. 11)

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[1] "F" denotes "Finding".

7. "The general nature and activity of the air base operations over the period of a 24-hour day, is such that there is no distinction from hour to hour and no distinction between any hour insofar as plaintiff's responsibilities for responding to all calls and demands is concerned.", (F. 14)

8. "The night hours, like the day hours, required a constant 'watch' which was rotated among plaintiffs so that on each tour they served watch time once during the day hours and once during night hours." (F. 11)

The Court below denied any compensation for employment during the night hours and any compensation for employment over 16 hours per day.

REASONS FOR GRANTING THE WRIT

I.

THE DECISIONS OF THE COURT BELOW CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT

The Court below has been lulled by a righteous-sounding phrase—time spent in sleeping and eating should not be paid for—without considering the test laid down by the United States Supreme Court in *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 137 (1944), as follows:

> "Facts may show that the employee was engaged to wait or they may show that he waited to be engaged. His compensation may cover both waiting and task or only performance of the task itself. Living quarters may in some situations be furnished as a facility of the task and in another as a part of its compensation. The law does not impose an arrangement upon the parties. It imposes upon the courts the task of finding what the arrangement was."

Instead, the Court has limited its scrutiny and findings to the question of whether there was actual physical labor performed during night hours when sleep was permitted, subject to call, and during which calls were answered. On this basis it has reached a conclusion of law in its thinking which precludes waiting time from being working time.[1] Such a conclusion of law is in conflict with the decision of the Supreme Court in *Skidmore v. Swift, supra:*

> "For reasons set forth in the Armour case, 323 U.S. 126, 65 S. Ct. 165, decided herewith, . . . we hold that no principle of law found either in the statute or in court decisions precludes waiting time from also being working time."

The Supreme Court, in speaking of the action of the lower court in that case, stated:

> "Its evaluation and inquiry were apparently restricted by the notion that waiting time may not be work, an understanding of the law which we hold to be erroneous."

Thus the Court of Claims restricts its evaluation and inquiry by the notion that 'sleeping' and eating time may not be work, contrary to the opinion of the United States Supreme Court.

The fact that actual physical labor was not performed is not the test laid down by the Supreme Court. To the contrary, the Supreme Court has said:

> "Of course, an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for

[1] The Court has now recently expressed this conclusion in *Arary v. United States*, No. 266-56, C. Cls. March 5, 1958 and *Collins v. United States*, No. 141-56, C. Cls., March 5, 1958, both motions for summary judgment, then in *Ahearn v. United States*, No. 332-55, C. Cls., May 7, 1958, and now in the case at bar.

> something to happen. Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employments in a stand-by capacity. Readiness to serve may be hired quite as much as service itself and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer." *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944).

Therefore, the Court below, in failing to recognize the principles laid down by the Supreme Court in *Armour & Co. v. Wantock*, *supra*, and by making the test one of actual physical labor, is in conflict. Such a conflict requires resolution by the Supreme Court.

The Court below has failed to consider the arrangement between the parties and that the time spent by plaintiffs during the night on the job was for the employer's benefit. The plaintiffs were arbitrarily ordered to stay on the job 20 hours or 24 hours per week[2] *more* than other employees working side-by-side with them, without pay, without any special agreement authorizing the additional hours above the basic 40 hour week, and without any consideration whatsoever.

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[1] That inactive duty may be duty nonetheless is not a new principle invented for application to this Act. *M. K. & T. Railway Company v. U. S.*, 231 U.S. 112, 119 (1913):

> "But they were under orders, liable to be called upon at any moment and not at liberty to go away. They were nonetheless on duty whether inactive. Their duty was to stand and wait."

See also, *Chicago, Rock Island & Pacific Railway Co. v. United States*, 253 Fed. 553 (1918).

[2] Twenty hours per week additional was required if the tour of duty was 60 hours and 24 hours additional was required if the tour was 72 hours. Plaintiffs worked both tours of duty.

Plaintiffs' services were required all hours of the night or the function of the base would not be adequately performed and the necessary protection and service would not be available. The base would have had to shut down. The arrangement was for the employer's benefit for which it paid no compensation to the employees.

The fact is, this case involves a clever device by which the Government has succeeded in getting 8 hours free service per day at the expense of the employee, for if the plaintiffs had not been on the job, the Government would have had to employ someone else to be there in their place and to pay them. The plaintiffs are likewise entitled to be paid.

When plaintiffs were employed, it was understood that there would be no distinction between the hours of the day or night and no specific time was set aside for the carrying on of any personal activities such as sleeping or eating. There was no discussion at the time of employment regarding hours for sleeping.

The Headquarters Office Instruction governing plaintiffs' hours of duty provided: "The tour of duty for firefighters will consist of 24 hours on duty and 24 hours off duty."

There was no Base regulation or Department of the Air Force Regulation that authorized or prescribed any time for sleeping and eating for plaintiffs. There was no arrangement to pay plaintiffs for any actual physical labor performed during night hours and they were not paid for any such labor. Thus they were not waiting to be engaged and then compensated, but were engaged to wait and thus entitled to compensation for their waiting time. If the intention was to provide

compensation for hours of physical effort only, then they would have been engaged as Wage Board or hourly employees, but this was not the case; the Congress provided for their classification and pay as per annum employees. They were employed for regular, fixed tours of duty, 24 hours per day.

The 1945 Federal Employees Pay Act, 59 Stat. 295, applicable in this case, provides overtime pay for all hours of employment in excess of 40 per week. Plaintiffs are classified employees and are subject to specific coverage of the overtime pay provision. None of the numerous exceptions contained in the Act apply to plaintiffs. It should be noted the Act, in addition, provides for special overtime arrangements for certain categories of employees, but not plaintiffs. The Act makes no mention of sleeping or eating time for employees. Neither is there reference to any special treatment of eating or sleeping time in the hearings, reports or debates of the Congress on this legislation.[1]

It should be noted that the predecessor Pay Act of 1943 (57 Stat. 75) provided compensation for this type of overtime work by giving premium compensation. The successor Pay Act of 1954 (68 Stat. 1111) likewise gave premium compensation for overnight duty. However, the 1945 Act which is applicable here did not provide for premium pay, but did give overtime pay on a diminishing scale of hours of employment above 40 per week. The courts must follow the act, and if there is to be variation, then the Congress should do the amending.

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[1] Subsequent legislation, years later, differentiates between sleeping and eating time, but that action cannot be related back to the 1945 Federal Employees Pay controlling in this case or be construed as writing its legislative history.

The defendant has advanced *Conn* v. *United States*, 107 C.Cls. 422, 68 F.Supp. 966 (1946), as an argument for not paying employees for working overnight. That case was decided under an entirely different statute which provided premium pay for overnight work and the court found plaintiffs were properly paid for their night work under the premium pay proviso which is not included in the statute applicable to the case at bar.

The defendant has heretofore cited *Gaethe* v. *United States*, 136 C.Cls. 756, 145 F.Supp. 913 (1956), but ignores the existence of a written contract between the employer and employees in that case which excepted time allowed for sleeping and eating from payment. Of this contract the Court said: "The contract between the employees and the railroad was a sensible and realistic application of the statute to the peculiar requirements of plaintiffs' jobs", and as a consequence, there was no obligation on the part of the railroad to pay. There was no such contract in the case at bar.

The Court below refers to *Armour & Co.* v. *Wantock*, *supra*, as authority "for the right of the employee to recover compensation for standby time that does not include eating, and sleeping time." Technically correct, the statement nevertheless gives the impression that this Court ruled against compensation for sleeping and eating time so it must be emphasized that the question of pay for nighttime hours or eating hours was not presented to the Supreme Court and the Court did not pass on it. The governing statute in that case was the Fair Labor Standards Act and its wording and purport with respect to overtime is almost identical with the statute in the case at bar."

It should be noted that all cases to date have followed the general rule that daytime waiting may be employment time. The instant case is no exception. The waiting time in all of these cases included time in which the employee was doing nothing, or during which he was engaged in some form of recreation to while away the time or perhaps even sleeping as he was not ordered to physically labor by his superiors. This disposition of his time was not of his choice but was brought about for the convenience and benefit of his employer who needed his presence. Therefore, for the lower court to say that an employee can be paid under the statute for idleness or time spent in playing dominoes, but not for time when he is officially ordered to be on duty and is allowed to sleep because there is no physical work to be done, although he is subject to calls and responding to calls, is inconsistent.

> "Inconsistency is at once suggested when a distinction is made between an employee . . . who is subject to call but who is sleeping, and one who is subject to call and is listening to the radio or playing solitaire . . . It is perhaps true that Congress did not visualize a case of this kind when the Act was passed. If this be a sound premise we suggest without temerity, and we hope without appearing immodest, that it would be highly appropriate for Congress to amend the act: Surely courts *cannot*, or it might be more correct to say, should not do the amending." (*Armour & Co. v. Wantock*, 140 F.2d 357 aff'd, 323 U.S. 126.)

We respectfully note the Court below refers to an old, inapplicable Wage and Hour Division Interpretative Bulletin of the Department of Labor as authority and ignores the current applicable bulletin which provides directly the opposite.

The Court below quotes a portion of the Supreme Court decision in *Skidmore* v. *Swift & Co., supra,* which seems to imply that the Supreme Court leaned to the position taken by the Wage and Hour Division of the Department of Labor.

However, directly the opposite position is taken in the current interpretative bulletin[1] taking the place of the interpretation existing at the time of the decision in *Skidmore* v. *Swift & Co., supra.* It provides directly the opposite with reference to sleeping time, as follows:

In Section 785.3 d—

> "Under certain conditions an employee is considered to be working even though some of his time is spent in sleeping or in other activities."

And in footnote 22, the Bulletin states as follows:

> "Where no expressed or implied agreement to the contrary is present the 8 hours of sleeping time and lunch periods constitute hours worked. *General Electric Company* v. *Porter*, 208 F.2d 804 (C.A. 9), certiorari denied, 347 U.S. 975."

With respect to eating time, the current Bulletin provides:

> "The employee must be completely relieved from duty for the purpose of eating regular meals or the mealtime will be considered working time.
>
> "The employee is not relieved if he is required to perform any duties whether active or inactive while eating; for example, the office employee who is required to eat at his desk . . ." (785.3 d)

[1] Wage and Hour Interpretative Bulletin (Part 785).

Thus the Department of Labor has taken the position that sleeping time on the job in the absence of an agreement to the contrary, is working time and that mealtimes on the job are likewise working times.

The Court below states in its decision that since the decisions in *Armour & Co.* v. *Wantock*, *supra*, and *Skidmore* v. *Swift & Co.*, *supra*, employees have been denied compensation for time spent in sleeping and eating. We respectfully note that the Court below recognized sleeping and eating time as being compensable in *Farley* v. *United States*, 131 C.Cls. 776 (1955) and in *England* v. *United States*, 133 C.Cls. 768 (1956) on the ground that:

> ". . . Freedom of choice to follow her own habits was restricted for the benefit of defendant . . ."

Also, in *General Electric Company* v. *Porter*, 208 F.2d 805 (9th Cir. 1954), allowing compensation for eating and sleeping time, the Court said:

> "Considering the nature of the services performed by the firemen we conclude that the firemen were engaged to wait; that their compensation covered both waiting and task and that the living quarters were furnished as a facility of the task."

Cf. *Central Missouri* v. *Conwell*, 170 F.2d 641, 648 (8th Cir. 1948); *Chicago, Rock Island & Pacific Railway Company* v. *United States*, 253 Fed. 555, 556 (8th Cir. 1918); and *Glen L. Martin Nebraska Co.* v. *Calhoun*, 197 F.2d 981 (8th Cir. 1952).

The Court below places reliance on a regulation of the United States Civil Service Commission which provides for payment of only the daytime hours of employees. The Congress did not repose in the Com-

mission the authority to promulgate regulations contrary to law. We furthermore feel that it is inconsistent to cite a violator of the law as authority for his own violation.

Furthermore, the very regulation of the Commission relied upon specifically provides:

> "The regularly scheduled administrative work week shall be the total number of regularly scheduled hours of duty per week, including all stand-by time except that allowed for sleep and meals by regulations of the departments." (Federal Personnel Manual, Z-1, Section 25.211 (e)).

No regulations of the Department prescribed time for sleep and meals. Thus the administrative work week in the case at bar was a full 60 hours or 72 hours, as the case might be.

II.

THE DECISIONS OF THE COURT BELOW CONFLICT WITH PERTINENT DECISIONS OF THE CIRCUIT COURTS OF APPEALS

The decisions and reasoning of the Court of Claims in the present case is in conflict with the decision of the Ninth Circuit Court of Appeals in *General Electric v. Porter, supra.* In that decision, the Circuit Court of Appeals found that sleeping time of firefighters was working time.

> "Considering the nature of the service performed by the firemen, we conclude that the firemen were engaged to wait; that their compensation covered both waiting and task, and that the living quarters were furnished as a facility of the task. As previously stated, the firemen were required to remain at the station for the entire twenty-four hour shift ready to answer alarms at any hour of

> the day or night. They were as completely under the direction of General Electric during the eight-hour sleeping period as during the other sixteen hours of the shift. They were on the employer's premises at night primarily for the benefit of General Electric, and as the only effective means to provide twenty-four hour protection for the communities of Richland and North Richland. During the hours that they were at the fire station they were not free to do as they would. The sleep allowed was a fitful one at best, which might be said to have been with one eye open in anticipation of the moment they would be called upon to jump to the response of an alarm. The trial court found that the sleeping facilities provided were adequate. We may consider that finding as not being clearly erroneous. That fact in itself is not determinative as to the compensability of the sleeping time. It would be of importance in the case of an agreement that sleeping time would not be considered work time."

In the case at bar, with almost identical facts, and no distinguishable differences of basic fact and law, the Court of Claims held the opposite, i.e., that sleeping and eating time could not be working time because no physical labor was being performed.

The present decision is likewise in conflict with the decision and reasoning of the Eighth Circuit Court of Appeals in the case of *Glen L. Martin Nebraska Company* v. *Calkin*, 197 F.2d 981, 984 (1952), cert. den. 344 U.S. 866 (1952), as follows:

> "Much emphasis is placed by defendant upon the fact that only in comparatively few instances did the evidence show that guards or firemen were required to answer calls for fires or to quell disturbances during the 30 minute period in question. But the question was not so much whether the

guards and firemen were actually regularly called upon to put down overt acts of violence, sabotage, disturbances, or to put out fires during the 30-minute period, *as it was whether they were performing their regular duties during that period and were then substantially performing the duties assigned to them by their employer and were not free to follow pursuits of a purely private nature.*" (Emphasis supplied)

Cf. *Armour* v. *Wantock*, 323 U.S. 126 (1944); *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944); *Bowers* v. *Remington Rand*, 64 F. Supp. 620 (S.D. Ill. 1946); aff'd. 159 F.2d 114 (7th Cir. 1946), cert. den. 330 U.S. 843 (1947); *Bell* v. *Porter*, 159 F.2d 117 (7th Cir. 1957), cert. granted 330 U.S. 817, grant of cert. vacated and cert. den. 330 U.S. 813, reh. den. 331 U.S. 864 (1947); *Roley* v. *Daly & Zimmerman*, 157 F.2d 734 (8th Cir. 1946); *Bridgeman* v. *Ford, Bacon & Davis*, 161 F.2d 962 (8th Cir. 1947); *McLaughlin* v. *Todd & Brown, Inc.*, 7 W.H. Cases 1014; 15 Labor cases, par. 64606 (N.D. Ind.); See also: *Campbell* v. *Jones & Laughlin*, 70 F. Supp. 996 (W.D. Pa. 1947).

We respectfully note that the lower court cites *Bowers* v. *Remington Rand*, *supra*, and *Bell* v. *Porter*, *supra*, as holding against compensation for hours during which sleeping and eating on the job were permitted. In these cases the Court specifically found that there were express agreements or contracts between the employees and the employers exempting such time from working time. In the case at bar there was no such agreement.

III.

THE DECISIONS OF THE COURT BELOW ARE IN CONFLICT

The Court below has handed down four conflicting decisions in cases involving essentially the same facts and the same statutory provisions as those in the case at bar. The Court made no distinction between those cases with regard to special circumstances or reasoning that might be involved. These cases are as follows:

A. Full Recovery Allowed— Farley v. United States

The Court found in *Farley v. United States*, 131 C. Cls. 776 (1955), that all hours of duty above the basic 40-hour work week officially required, including sleeping time, were compensable at overtime rates. The Court said:

> "In these circumstances, we cannot escape the conclusion that the correctional officer was on duty. The order itself stipulated that the officer should 'remain on duty'. Her freedom of choice to follow her own habits was restricted for the benefit of the defendant . . ."

Cf. *England v. United States*, 133 C.Cls. 786 (1956). In these cases the court below followed the decisions of the Supreme Court in *Armour v. Wantock*, *supra*, and *Skidmore v. Swift & Co., supra*.

The decision in the instant case finds the Court below reasoning that its decisions in the *Farley* and *England* cases allowed compensation for night time spent in sleeping because substantial labor was performed during the time set apart for sleeping and eating. However, the decision was based upon a restriction of freedom of plaintiff's choice to follow her own habits for the benefit of the defendant as stated above, and nowhere in the

decision was the reasoning based on "substantial labor." In fact, the only evidence concerning nighttime work before the court was the uncorroborated testimony of the plaintiff herself, unsupported by logs, records or any other evidence. The court found the evidence in the *Farley* case showed that at 9:30 p.m. the lights were turned out, and the plaintiff expressly permitted to go to sleep in a private room used by her exclusively, and that she was not required to engage in active duty except on rare occasions. She was not required to have any sort of watch. The case at bar presents a far more substantial claim to the description "substantial labor" performed during night hours.

B. No Recovery Allowed—
Sawyer v. United States

In Sawyer v. United States, 139 C. Cls. 837 (1957), the Court held directly the opposite without comment, and denied any recovery for night hours of duty, although the surrounding circumstances presented an even stronger set of facts to support a decision in line with *Farley v. United States, supra*.[1]

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[1] The *Sawyer* case presents a still further conflict or a conflict within a conflict, as it was decided "on the authority of our opinion in the *Gaetke* case . . ." (*Gaetke v. U. S., supra.*) These two cases are not comparable. In the *Gaetke* case the court below found the arrangement between plaintiff and defendant was embodied in a formal contract negotiated by plaintiffs' union which "was a sensible and realistic application of the statute to the peculiar requirements of plaintiffs' jobs." The contract was fulfilled. There was no contract in the *Sawyer* case.

In the *Gaetke* case, the Court cited *Winsberg v. United States*, 120 C. Cls. 511 (1951), which was based on a different statute containing a proviso for compensatory time off for overtime, which was granted, and which the Court found to be adequate compensation under the law. There was no compensatory time off or other benefit granted plaintiffs in the *Sawyer* case or the case at bar.

The reasoning of the *Farley* case was not followed, i.e., even though plaintiff's "freedom of choice to follow [her] own habits was restricted for the benefit of the defendant", as in *Farley*. The Court ignored such reasoning.

C. Partial Recovery Allowed for Actual Physical Work—Ahearn v. United States

In a third decision falling between the two previous extremes, the Court below, in similar circumstances, gave recovery for physical labor performed during night hours and meal times, but granted set-off for time above 8 hours during which meals might be eaten or sleep allowed. *Ahearn* v. *United States*, No. 332-55, C.Cls. May 7, 1958.

The *Ahearn* decision is further confused by a more recent decision, *Wright* v. *U. S.*, No. 232-57, C.Cls. January 14, 1959, wherein the Court held: "Compensation for 2 3's of the 24 hours plaintiffs were on duty seems to us to be a sensible construction of the Federal Employees Pay Act of 1945 (59 Stat. 295)." Thus the Court has said in the *Wright* case that all time but 8 hours allowed for sleeping and eating are compensable—16 hours; and in the *Ahearn* case that all hours of actual physical labor performed during the 8 hours allowed for sleep are compensable—but if plaintiffs' permissive sleeping time might have been more than 8 hours, then such excess hours could be used to offset the hours of physical labor performed during hours allowed for sleep. The effect is to allow one legitimate claim to offset another legitimate claim. This cannot be reconciled.

D. Both Full and Partial Recovery Disallowed

The fourth and latest decision by the Court below is in the case at bar wherein the immediately preceding decision of the Court in this line of cases, *Ahearn* v. *United States, supra,* which allowed recovery for hours actually physically labored at night was not followed, even though there was a finding of actual physical labor being performed at night.

It should be noted that the trial in the case at bar, as in the *Ahearn* case, was limited by stipulation to the question of liability, the question of any liability to be determined by a further proceeding pursuant to Rule 38, U. S. Court of Claims. It would seem consistent for the Court to follow its decision in the *Ahearn* case as actual physical labor was performed at night, but the instant decision overruled the *Ahearn* case.

These cases all involve the construction of Sections 201 and 301 of the 1945 Federal Employees Pay Act. In each case plaintiffs were United States employees and were ordered to be on the job either 60 or 72 hours per week. The freedom of all was restricted for the benefit of the Government, defendant. In only one case, *Gaetke* v. *United States, supra,* was there a special agreement excluding night hours and meal times from employment time. Yet the decisions went off in different directions.

In *Farley* the Court based its decision on the restriction of plaintiff's freedom.

In *Gaetke* the decision was based on a special contract.

Sawyer was decided on the authority of *Gaetke*, although there was no special contract involved.

The *Ahearn* decision was predicated on the performance of some actual physical labor.

In the case at bar, the court undertook to construe what the Congress intended by use of the word employment and came into conflict with the decisions of the Supreme Court[1] as well as its own previous decisions.

There is thus no legal guide line for litigants to follow.

There is no possibility that these divergent holdings can be harmonized in the Court below. Each identical new case has brought a different decision without establishing any foundation in law. The matter is in dispute and will remain so until settled by the Supreme Court.

IV.
COURT BELOW HAS OVERLOOKED THE QUESTION OF NIGHT DIFFERENTIAL PAY

Plaintiffs' petition to the Court below seeks recovery for night differential, as provided by statute, for all hours of duty between 6 p.m. and 6 a.m.

The Federal Employees Pay Act of 1945 provides:

> "Title III. Sec. 301:
>
> "Any officer or employee to whom this title applies who is assigned to a regularly scheduled tour of duty, any part of which falls between the hours of 6 o'clock post meridian and 6 o'clock antemeridian, shall, for *duty* between such hours, excluding periods when he is in a leave status, be paid compensation at a rate 10 per centum in excess of his basic rate of compensation for duty between other hours * * *." [Emphasis supplied]

[1] *Armour & Co. v. Wantock, supra, Skidmore v. Swift & Co., supra.*

The Headquarters Office Instruction governing plaintiffs' hours of *duty* provided, "The tour of duty of firefighters will consist of 24 hours *on duty* and 24 hours *off duty*." (Emphasis supplied)

During the period of their claim plaintiffs' official work day consisted of 24 hours beginning at 8 a.m. and ending the following day at 8 a.m.

Being on duty regardless of what kind of duty or what they were doing brings them under Section 301 of the Act and therefore entitled to the full night differential provided by law. The law does not say "labor", "work", "employment", but "duty".

House Report No. 726, 79th Congress, 1st Session, covering the 1945 Pay Act clearly recites the reason for night differential pay on page 13 as follows:

> "The objective of providing a night differential is to compensate employees for working at undesirable hours and in some measure for the dislocation and disruption of their living habits which result from such work."

It is hardly necessary to add that the facts show plaintiffs to be within this intendment of Congress as they both worked at night and had their living habits and home life disrupted by their confinement at the Base for the convenience of the Government.

Notwithstanding, the Court below nowhere gave consideration to the question of night differential pay. Its opinion was devoted solely to overtime pay which is covered by an entirely different section of the statute. Its opinion was in a large measure directed toward a definition of the word "employment" as used in Title III, Section 201 of the statute. Its conclusion as to the

meaning of employment was contrary to the decisions of the United States Supreme Court as cited in Section I hereof. It did not consider the application of Section 301. Plaintiffs are entitled to a decision on that point as well as the question of overtime.

V.

THIS CASE INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE DECIDED BY THIS COURT

This case involves the proper treatment of employees of the United States Government through the correct application of principles laid down by the Congress. The policies followed by the Federal Government should set the standard and serve as a model for private business. It is, therefore, imperative that its decisions embody a correct application of the law. Not only should the law be correctly applied, but there should be no distinction between the treatment accorded private industry and Government employees under similar statutes, such as now exist.[1]

Furthermore, there should be a clear enunciation of principle consistent with the decisions of the Supreme Court in *Armour & Co.* v. *Wantock*, *supra*, *Skidmore* v. *Swift & Co.*, *supra*; cf. *M. K. & T. Ruy. Co.* v. *United States*, *supra*, and therefore, the present conflicts and confusion existing in the six decisions of the Court below should be resolved and clarified so the lawyer can have a stable basis on which to advise his clients.

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[1] *General Electric* v. *Porter*, *supra*, awards full compensation to firefighters for all night duty. The Court below denies any compensation. See also discussion in Section II hereof. *Cf. M. K. & T. Railway Co.* v. *U. S.*, *supra*; *Central Mo.* v. *Connell*, *supra*; *Chesa. R. I. & Pac. Ruy.* v. *U. S.*, *supra*, and *Glen L. Martin Neb. Co.* v. *Culkin*, *supra*.

As of this date the Court below has 101 cases, presenting this precise question, pending before it. Involved are 2655 plaintiffs. Thus it can readily be seen the Supreme Court should decide the question to eliminate the impasse now confronting both the Court and plaintiffs.

CONCLUSION

The variety of decisions handed down by the Court below without reconciliation and based on identical facts have placed Federal Civilian employees and their attorneys in such a state of uncertainty that they do not know on what basis to proceed. These decisions are in conflict with applicable decisions of the United States Supreme Court. In addition, the conflict of opinions in the circuit Courts of Appeal further compounds the confusion. This utter confusion requires the clarifying wisdom of this Court and for that reason this petition for a writ of certiorari should be granted.

Respectfully submitted,

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